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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JANET KINKLE,

Plaintiff and Appellant,

v.

FIRST TENNESSEE BANK NATIONAL
ASSOCIATION,

Defendant and Respondent.

G058137

(Super. Ct. No. 30-2018-01038152)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di
Cesare, Judge. Affirmed.

Bridgepoint Law Group and Eyad Yaser Abdeljawad for Plaintiff and
Appellant.

The Law Offices of Jason C. Tatman and Darren J. Delvin; Hoffman &
Pomerantz and Andrew S. Pomerantz for Defendant and Respondent.

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When there are surplus proceeds after a home foreclosure sale, the Civil Code governs how the surplus proceeds are to be distributed.¹ Generally, the foreclosed homeowner is only entitled to surplus proceeds (or a portion thereof) after all junior liens on the property have first been fully satisfied. (§ 2924k, subd. (a)(1)-(3).)

Here, appellant Janet Kinkle mortgaged a home. She later took out a home equity line of credit (HELOC) secured by a second deed of trust. The mortgagor foreclosed on the home, sold it at a trustee's sale, and deposited \$176,812.80 in surplus proceeds with the court. First Horizon Home Loan Corporation (First Horizon) held the second deed of trust, with \$189,060.56 due on the HELOC. The court found respondent First Tennessee Bank National Association (First Tennessee) to be a valid assignee of the second deed of trust and awarded First Tennessee \$176,812.80 in surplus proceeds.

Kinkle argues: First Horizon never filed a written claim for the surplus proceeds; neither First Horizon nor First Tennessee had standing to file claims; First Horizon failed to properly assign its interests to First Tennessee; and the second deed of trust was extinguished by the lapse of time. We find no errors and affirm the judgment.

I

FACTS AND PROCEDURAL HISTORY

In 2004, Kinkle took out a \$377,000 mortgage on a Mission Viejo home through Countrywide Home Loans, Inc. About two years later, Kinkle took out a \$205,000 HELOC through First Horizon. The First Horizon loan was secured by a second deed of trust.

In 2017, MTC Financial Inc. (MTC) was substituted as the mortgagor. Kinkle defaulted on the mortgage. About a year later, MTC foreclosed on the property and sold it at a trustee's sale for \$620,000.

¹ Further undesignated statutory references are to the Civil Code.

Court Proceedings

On December 12, 2018, MTC filed a petition with the trial court to deposit \$176,812.80 in surplus proceeds from the trustee's sale: "After due diligence, the trustee is unable to determine the priority of the written claims received by the trustee to the trustee's sale surplus proceeds."

On January 2, 2019, the trial court signed an order allowing MTC to deposit the surplus proceeds (\$176,812.80).

On January 22, 2019, First Tennessee filed a claim for the surplus proceeds with the trial court. First Tennessee stated it was the successor in interest to the second deed of trust through a merger with First Horizon. First Tennessee averred that it was "owed an unpaid principal balance and accrued interest of \$189,060.56."

On March 4, 2019, Kinkle filed a claim for the surplus proceeds with the trial court. Kinkle averred, "I know of no other person with a superior claim to the surplus funds from the sale of the property."

On April 12, 2019, the court continued a hearing and issued a tentative ruling: "It appears that the next recorded lien against the subject property was recorded June 14, 2006 by non-claimant First Horizon Home Loan Corporation for its second deed of trust recorded against the property in the principal amount of \$205,000.00. If valid and claimed by First Horizon, this lien would consume the entire remaining sum on deposit."² The court went on to state "additional information is needed regarding the validity, amount and timing of the First Horizon lien including but not limited to whether there is a balance owed and if so how much is owed by the borrower. The claimant borrower is ordered to file a declaration to explain and clarify the timing and amount owed on the First Horizon second deed of trust."

²There was another junior lien holder (Ford Motor Credit Company), but this claimant received none of the surplus proceeds and is no longer a party to the proceedings.

On June 6, 2019, Kinkle filed a supplemental declaration. Kinkle acknowledged the HELOC and the second deed of trust held by First Horizon, but averred “it is my understanding that this company no longer does business” and she “was never aware of any successors in interest that had assumed the loan.”

On June 7, 2019, First Tennessee filed a supplemental declaration. Rachael Driskill averred that she is employed by “First Tennessee . . . successor thru merger with First Horizon . . . as a Director of Default Servicing and Collections” First Tennessee attached a copy of the second deed of trust. Driskill averred Kinkle “defaulted . . . by failing to make payments due. The amount due and owing under the Note and Deed of Trust as of February 19, 2019, is \$189,060.56.”

On June 21, 2019, the trial court conducted a hearing. After oral argument, the court said, “The matter will be continued to the 26th of July. The court reserves a right to issue a decision before that time without further argument.” Kinkle’s counsel asked whether “any type of documentation” was needed. The court said, “No. You’ve already briefed it. You’ve already briefed the matter. No further documentation is required. You’ve had that opportunity.” The court clarified, “On the 26th, unless you get a ruling from me before that time, you’re expected to appear either in person or by court call. But if I do rule before that time, then you’ll receive a minute order ruling and then there will be no need to appear in the matter of law calendar.”

On July 26, 2019, the court telephonically notified the claimants that no appearances were necessary and issued a minute order ruling: “The court hereby determines that Tennessee Bank, N.A. Successor Through Merger with First Horizon

Home Loan Corporation (“FHHLC”) is entitled to the surplus funds totaling \$176,812.80 that were received by the Court from [MTC] on 01/18/19.”³

II

DISCUSSION

Kinkle argues reversible error because: First Horizon never filed a written claim for the surplus proceeds; neither First Horizon nor First Tennessee had standing to file claims for surplus proceeds; First Horizon failed to properly assign its interests to First Tennessee; and the second deed of trust was extinguished by the lapse of time.

We will first review general legal principals regarding the distribution of surplus proceeds in nonjudicial foreclosure sales. We will then apply the law to the facts in this case. We will then address Kinkle’s four claims of error on appeal.

A. General Legal Principles

The Civil Code governs nonjudicial foreclosure sales. (§ 2924 et seq.) “The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

³ Kinkle’s attorney, Yaser Abdeljawad, made several claims of “outrageous” conduct by the trial court in the opening brief. For example: “Even more outrageous, the court rendered its written ruling on the morning of the hearing, without affording the litigants the opportunity to present oral arguments.” This is not accurate. The court allowed the parties to orally argue the matter prior to rendering its ruling. We remind Mr. Abdeljawad that an attorney has the duty: “To maintain the respect due to the courts of justice and judicial officers.” (See Bus. & Prof. Code, § 6068, subd. (b).)

Section 2924j establishes the procedures for how interested persons are informed of and are to claim surplus proceeds following a nonjudicial foreclosure sale. Generally, if there are funds remaining after payment of the trustee's expenses and satisfaction of the debt secured by the deed of trust that was the subject of the trustee's sale, the trustee must provide written notice of the surplus funds to all persons with a recorded interest in the property, informing them how to submit a claim for all or a portion of the remaining proceeds. (§ 2924j, subd. (a).)

Noticed parties have 30 days to submit a written claim to the trustee. (§ 2924j, subd. (a)(4)(C).) A claim must be "executed under penalty of perjury" and contain two elements: "(A) The amount of the claim to the date of trustee's sale"; and "(B) An itemized statement of the principal, interest, and other charges." (§ 2924j, subd. (a)(4)(A), (B).) The trustee must then "exercise due diligence to determine the priority of the written claims." (§ 2924j, subd. (b).) If within 90 days the trustee is unable to determine the priority of the written claims or "if the trustee determines there is a conflict between potential claimants" then the trustee must either file an interpleader action or deposit the surplus proceeds with the superior court, and file a declaration of unresolved claims. (§ 2924j, subds. (b)-(c).)

If the trustee chooses to deposit the undistributed surplus proceeds with the superior court, before doing so, the trustee must provide written notice to potential claimants informing them that the surplus funds will be deposited with the court and that a claim for the funds must be filed with the court within 30 days. (§ 2924j, subd. (d).) When filing a declaration of unresolved claims, the trustee must also submit to the superior court "any information relevant to the identity, location, and priority of the potential claimants." (§ 2924j, subd. (c).) After depositing the undistributed funds with the superior court, the trustee is relieved of the responsibility of dispersing the surplus proceeds. (§ 2924j, subd. (c).)

The court clerk must provide notice of a hearing to all claimants included in the trustee's declaration and a hearing on the claims should be held within 90 days after deposit of the surplus proceeds with the court. (§ 2924j, subd. (d).) The court "shall consider all claims filed at least 15 days before" the hearing and "shall distribute the deposited funds to any and all claimants entitled thereto." (§ 2924j, subd. (d).)

Section 2924k establishes the order in which proceeds from the trustee's sale are to be distributed. First, are "the costs and expenses of exercising the power of sale . . . including the payment of the trustee's fees and attorney's fees." (§ 2924k, subd. (a)(1).) Second, the obligation secured by the deed of trust or mortgage that was the subject of the trustee's sale. (§ 2924k, subd. (a)(2).) Third, are "the outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority." (§ 2924k, subd. (a)(3).) After payment of the trustee's expenses and payment to any lienholders, any proceeds remaining are paid "[t]o the trustor or the trustor's successor in interest" (i.e., the homeowner at the time of foreclosure). (§ 2924k, subd. (a)(4).)

B. Application and Analysis

After initiating a foreclosure and a trustee's sale of Kinkle's former home, MTC deposited \$176,812.80 in surplus proceeds with the trial court and filed a declaration of unresolved claims. (See § 2924j, subds. (b)-(c).) MTC also submitted additional information regarding potential claimants; MTC specifically identified First Horizon as the holder of a second deed of trust. (See § 2924j, subd. (c).)

Prior to holding a hearing on the property matter, the trial court issued a tentative ruling stating that First Horizon appeared to be the priority junior lienholder. The court then asked for "additional information . . . regarding the validity, amount and timing of the First Horizon lien including but not limited to whether there is a balance owed by the borrower. The claimant borrower is ordered to file a declaration to explain and clarify the timing and amount owed on the First Horizon second deed of trust."

Claimant First Tennessee filed additional supporting exhibits; its representative averred in a declaration that First Tennessee was a successor in interest through merger with First Horizon. First Tennessee averred that Kinkle still owed \$189,060.56 on the HELOC secured by the second deed of trust.

Prior to a hearing on the distribution of excess proceeds, Kinkle filed a declaration acknowledging the HELOC, as well as the second deed of trust held by First Horizon. At the hearing, the court heard arguments by First Tennessee and Kinkle. After considering the competing claims presented at the hearing, as well as the supporting documents, the court later “distribute[d] the deposited funds to any and all claimants entitled thereto.” (See § 2924j, subd. (d).) The court ultimately found First Tennessee to be a valid assignee of the second deed of trust. The court determined that since the amount of money Kinkle owed on the HELOC (\$189,060.56) exceeded the amount of surplus proceeds (\$176,812.80), First Tennessee as priority lienholder was entitled to the entire balance of surplus proceeds (\$176,812.80). (See § 2924k.)

In sum, we find that the trial court properly complied with the procedures and substantive law regarding the distribution of surplus proceeds after the nonjudicial foreclosure of Kinkle’s former home. (See §§ 2924j, 2924k.)

C. Kinkle’s Four Claims of Error on Appeal

Kinkle argues this case involves the “interpretation and application” of sections 2924j and 2924k, and therefore we should apply a de novo standard of review. Were this purely a case of statutory interpretation, we would agree. (See *County of Yolo v. Los Rios Community College Dist.* (1992) 5 Cal.App.4th 1242, 1248-1249.) However, Kinkle also challenges the trial court’s factual findings. A trial court’s factual findings will not be disturbed on appeal if supported by substantial evidence. (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 294-295.)

1. The Filing of a Claim by First Horizon

Kinkle’s first argument is “at no particular point in time did *First Horizon* ever file a written claim with the court for its consideration.” (Italics added.) While this factual assertion is technically true, it is of no consequence; the trial court awarded the surplus proceeds to *First Tennessee*.

Again, First Horizon held the second deed of trust against Kinkle’s Mission Viejo home as security for Kinkle’s HELOC. On January 22, 2019, *First Tennessee* filed a written claim for the surplus proceeds. First Tennessee purported to be the “successor in interest” to First Horizon. Therefore, the more relevant question—which we will get to—is whether there was substantial evidence supporting the court’s factual finding that First Horizon assigned its interests under the second deed of trust to First Tennessee.⁴

Kinkle primarily relies on *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1105, for the proposition that “a junior lienholder may be entitled to some or all of the surplus proceeds, if that person has filed a timely claim” But *Banc of America* is not helpful to Kinkle because that case dealt with a junior lienholder who did not file a “request for special notice” under section 2924b. (*Banc of America*, at p. 1105.) Here, unlike *Banc of America*, the trustee (MTC) chose to deposit the surplus proceeds with the trial court under the provisions of

⁴ Mr. Abdeljawad also stated in the opening brief that “the trial judge supplanted the record by claiming that a written claim was filed with the court by First Tennessee on 1/22/19, when the record clearly shows that was not the case” We also find this statement to be false because it is directly refuted by the record. In the respondent’s appendix there is a copy of a “NOTICE OF HEARING AND CLAIM FOR SURPLUS FUNDS” filed by First Tennessee in the matter of the subject property. The written claim is date-stamped and was electronically filed in the trial court on January 22, 2019. Again, we remind Mr. Abdeljawad that while attorneys have a duty to zealously represent their clients, they also have a duty to use “those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” (Bus. & Prof. Code, § 6068, subd. (d).)

section 2924j. And again, First Tennessee timely filed a claim for surplus proceeds with the trial court on January 22, 2019.

2. Standing of First Horizon and First Tennessee

Prior to the hearing on the surplus proceeds, Kinkle filed with the trial court a copy of a document filed by First Horizon on August 24, 2015, with the California Secretary of State. The form document is titled, “**CERTIFICATE OF SURRENDER OF RIGHT TO TRANSACT INTRASTATE BUSINESS**” (Certificate of surrender).

Based on First Horizon’s certificate of surrender, Kinkle argues that First Horizon—and First Tennessee as the “alleged successor” to First Horizon—lacked standing to assert its claims to the excess proceeds. We disagree.

Generally, a foreign corporation that transacts intrastate business in California must first obtain a certificate of qualification. “A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification.” (Corp. Code, § 2105.) The phrase “transact intrastate business” has a specific and legally defined meaning: “““Transact intrastate business” means to enter into repeated and successive transactions of business in this state, other than in interstate or foreign commerce.”” (*Conseco Marketing, LLC v. IFA & Ins. Services, Inc.* (2013) 221 Cal.App.4th 831, 840.)

A foreign corporation may later surrender its certificate of qualification by filing a certificate of surrender. A “foreign corporation which has qualified to transact intrastate business may surrender its right to engage in *that business* within this state by filing a certificate of surrender.” (Corp. Code, § 2112, italics added.)

However, regardless of its certification status, a foreign corporation generally has standing to defend or commence actions in our state courts. “A foreign corporation transacting intrastate business which has failed to qualify with the Secretary of State may nevertheless *defend* an action brought against it in state court. [Citations.]

A foreign corporation transacting intrastate business which has failed to qualify with the Secretary of State may also *commence* an action in state court.” (*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1739.) This is because solely defending or maintaining a lawsuit—or solely securing or collecting a debt—is not considered to be *transacting intrastate business*. (See *Conseco Marketing, LLC v. IFA & Ins. Services, Inc.*, *supra*, 221 Cal.App.4th at p. 840 [a “‘company shall not be considered to be transacting intrastate business . . . solely by reason of carrying on . . . any one or more of the following activities: [¶] . . . Maintaining or defending any action or suit’ or ‘Securing or collecting debts’”].).)

Here, Kinkle presented no evidence that First Tennessee was transacting intrastate business within the meaning of Corporations Code at the time of its claim for surplus proceeds. (See Corp. Code, § 191, subd. (a).) Rather, as a purported successor in interest to First Horizon, it appears First Tennessee was solely seeking to collect Kinkle’s debt owed on the HELOC by enforcing the second deed of trust on the subject property. Therefore, the trial court properly found that First Tennessee did, in fact, have standing to file its claim to the surplus proceeds.

Kinkle cites two cases for the proposition that a foreign corporation that fails to register in the State of California does not have standing to raise claims in California courts. (*Hurst v. Buczek Enterprises, LLC* (N.D.Cal. 2012) 870 F. Supp.2d 810, 818; *Neogard Corp. v. Malott & Peterson-Grundy* (1980) 106 Cal.App.3d 213, 219-220.) But these cases are factually distinguishable because they involve foreign corporations that conducted repeated and successive business transactions in California, in addition to raising or defending claims in California courts. (*Hurst*, at pp. 813-814 [foreign corporation provided “property maintenance, repair, and cleaning services” for homes in California]; *Neogard Corp.*, at pp. 226-227 [foreign corporation “sent sales representatives intrastate to induce construction contracts between California project designers and California waterproofing subcontractors”].)

Again, there is no evidence in the record that First Tennessee was otherwise transacting intrastate business in California when it filed its claim for surplus proceeds. Moreover, there is no evidence in the record that First Horizon continued to transact intrastate business in California after filing its certificate of surrender.

3. Assignment of Rights from First Horizon to First Tennessee

Kinkle argues that “First Tennessee *failed to present any evidence* showing the existence of any merger, conveyance, or assignment of rights to the [First Horizon] 2nd Deed of Trust.” (Italics added.) We disagree.

“Where findings of fact are challenged on a civil appeal, we are bound by the “elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,” to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957-958.)

“An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact. [Citations.] ‘The substantial evidence [standard of review] applies to both express and implied findings of fact made by the superior court in its statement of decision’” (*Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at pp. 957-958.)

Here, in a declaration filed with the trial court, Kinkle acknowledged that the subject “property was once encumbered by a junior lien that was held by First Horizon.” Although Kinkle also stated that she “was never aware of any successors of interest that had assumed the loan,” she attached as an exhibit a document that appeared to show that “First Tennessee National Bank” was among “The First Horizon Family of

Companies.” Kinkle also attached as an exhibit First Horizon’s certificate of surrender, which showed an address in Tennessee to be used for any “process against the corporation that is served upon the Secretary of State.”

In First Tennessee’s claim for surplus funds was a declaration of Driskill, who stated, “I am employed by Secured Creditor and Claimant First Tennessee Bank National Association *successor thru merger* with First Horizon Home Loan Corporation as a Direct of Default Servicing & Collections and am authorized to make this declaration for and on Claimant’s behalf.” (Italics added.) Driskill stated the address of the property, the date of the recording of the second deed of trust, and that Kinkle had “defaulted under the terms of the [HELOC] and Deed of Trust by failing to make payments due.” First Tennessee included a copy of the HELOC signed by Kinkle, and the second deed of trust, which was recorded by First Horizon and signed by Kinkle. The HELOC included the following provision: “**Assignment.** We [First Horizon] have the right to assign any amount you owe and also assign and transfer our rights under this agreement.”

In sum, there are supporting documents in the record and reasonable inferences that can be drawn from those documents (i.e., substantial evidence), to support the trial court’s factual finding that First Tennessee “appears to have been a valid assignee of the First Horizon Home Loan Corporation deed.”

Kinkle argues the trial court erred because no substitution of trustee was recorded with the County of Orange. But again, this is of no consequence. It is true that a “trustee under a trust deed upon real property . . . , *may be* substituted by the recording in the county in which the property is located.” (§ 2934a, subd. (a)(1), italics added.) However, a recorded substitution is not required to effectuate a valid assignment. (See *Cruz v. Aurora Loan Servs. LLC (In re Cruz)* (Bankr. S.D.Cal. 2011) 457 B.R. 806 [under California law, once an assignee of a note became entitled to enforce the note, it became the lender under deed of trust, even if its interest was not yet of record].)

4. Lapse of Time

Finally, Kinkle asserts: “The Holder of the [second deed of trust] never made any efforts to enforce the terms of the written agreement [(the HELOC)] in the event that it was breached.” As a result, Kinkle argues First Tennessee’s “rights against the property became extinguished through the lapse of time.”

Kinkle’s factual assertion regarding First Tennessee’s alleged failure to enforce the HELOC is not supported with any citations to the record. Further, Kinkle’s legal argument regarding First Tennessee’s alleged loss of rights by not pursuing repayment of the HELOC was not raised in the trial court; indeed, it was raised for the first time in her reply brief in this appeal.

In short, this argument has been forfeited for purposes of appeal and we decline to consider it. (See *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590 [“By failing to support the factual assertions in their legal arguments with citations to the evidence, plaintiffs have forfeited their argument”]; see also *In re Abram L.* (2013) 219 Cal.App.4th 452, 462 [“As a general rule, a party who does not raise an argument below forfeits the argument on appeal”]; *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583 [“points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier”].)

III

DISPOSITION

The judgment is affirmed. Costs are awarded to First Tennessee on this appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

GOETHALS, J.